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## grave matters

*We're about to find out what happens when our forbearers lie in the path of development. Again.*

Joan Conrow

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Kawika McKeague, chairman of the Oahu Island Burial Council (OIBC), is not a psychic. But he and other preservationists say they can see the future of the city's \$5.3 billion elevated rail project, and to them, it looks something like this:

The city will build the line from West Oahu to downtown, where it will start finding large concentrations of Hawaiian burials. The city, citing the billions already invested to get to that point, will then pressure the

Burial Council to relocate the iwi kupuna, or allow construction atop the bones. If Council members resist, they'll be vilified as anti-development obstructionists and blamed for delaying — perhaps even derailing — the project and adding greatly to its cost. If they go along, they'll be vilified as cultural sell-outs who set burial protection back to square one. The result, in any case, will be controversy, animosity, great sorrow and angst.

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The Burial Council is charged with protecting the bones that, according to Hawaiian religious tradition, are not only remains but are themselves ancestral to Hawaiians living today. Its leaders are so sure of what lies ahead, given the city's plan to start construction before it conducts an archaeological survey for the entire project, that they are taking the unprecedented step of creating a carefully documented institutional memory of their opposition to that approach.

"When the day comes, and we feel certain that day will come when there's an encounter of significance, we want to be able to hold our heads high and say we advised the city and others, we drew the line in the sand now, rather than acquiescing and waiting for that to happen," McKeague said.

It's a scenario preservationists have seen play out before and say is happening with increasing regularity as public and private projects move forward before their impact on ancient burial sites is fully assessed.

"This is like H-3 all over again, where they select the corridor first and then try to see if they can comply with state and federal preservation laws. We don't want to go through that again," said Edward Halealoha Ayau, executive director of Hui Malama I Na Kupuna O Hawaii Nei, which formed out of the cultural trauma of Honokahua, Maui, where some 1,100 iwi kupuna were unearthed during construction of the Ritz Carlton hotel.

"The irony is that when the situation first occurred at Honokahua, and Hawaiians engaged in civil disobedience in order to stop the disturbance of iwi, the state's response was you have to stop behaving this way and work within the system," Ayau recalled. "And now the state and counties are trying to undermine the very rules that were created to protect burials."

## **Undermining the Council**

Preservationists believe the city's plan to conduct the rail archaeological survey in phases, which allows it to put off the thorny issue of downtown burials for several years, is politically motivated. "Mufi's got a timetable and historic preservation completely destroys it," said one in reference to Honolulu Mayor Mufi Hannemann, who could make good hay of launching the jobs-producing rail project as he campaigns for the governor's seat. Preservationists note that Hannemann, if elected, will be in a position to appoint both the director of the State Historic Preservation Division [SHPD] and Burial Council members—allowing him to influence the disposition of burials encountered in the fourth and final phase, when they're most likely to be found.



“By the time they get downtown, the pressure’s gonna be there to bring this thing home, power through to the finish,” McKeague said. “In that climate, the relocation of burials, homes, utilities becomes easier.”

Burial Council members believe that Hannemann already is laying the groundwork to undermine their authority through his stated plan to create a Mayor’s Advisory Council on Iwi Kupuna for the rail project. “What we don’t want is Hawaiians fighting Hawaiians,” McKeague said. The OIBC outlined its concerns in a detailed letter to project manager Faith Miyamoto that included this statement: “It is unclear why the Mayor feels compelled to establish a group to address matters over which the OIBC has been statutorily assigned to act and advise upon, especially considering the long-standing relationship of the City and the OIBC.”

In a written response to questions, the city’s transportation services director, Wayne Yoshioka, provided this rationale for the decision to segment the AIS: “The advantage of a phased approach is to protect resources undisturbed. The Oahu Island Burial Council (OIBC) has requested and the City has agreed to a thorough and precise archaeological investigation. The City has agreed to pre-explore every column location within the highest-risk portions of the corridor. To have completed this level of investigation at an early stage would have required excavating much larger areas through downtown because the locations of the column foundations requires a level of design that typically takes place after the environmental impact statement and Section 106 of the [federal] National Historic Preservation Act processes conclude.”

But OIBC members say the surveys should be conducted up-front to help guide the city in preparing the Environmental Impact Statement and choosing the rail’s route and technology. They say an elevated system, which will be built atop columns that go deep into the ground, is more likely to impact burials. Sewer and utility lines also would need to be relocated into deep sediment that previously has not been disturbed, leading to the likelihood of more “inadvertent discoveries”—a burial classification that falls under the sole authority of SHPD. Burial Councils have legal jurisdiction only over iwi identified through an archaeological inventory survey (AIS).

OIBC members also believe the phased approach is illegal, a stance supported both by the National Trust for Historic Preservation—its attorneys expressed their concerns about the city’s “legal vulnerability” in an Oct. 22, 2009 letter to Yoshioka and the Federal Transit Administration—and attorney David Kimo Frankel of the Native Hawaiian Legal Corp.

“All historic review processes need to be completed prior to issuing permits or ground breaking,” Frankel said. “The issue is the city can’t make a decision whatsoever before the AIS is done.”

## **Historic doubts**

SHPD Administrator Pua Aiu isn’t so sure. She supports the city’s plan to do the surveys in phases, since construction of the elevated rail line also will be phased. “It doesn’t make sense to be ripping up entire

areas now before you do the [construction] work,” she said. “And even if you do a survey now, you only sample a percentage of your route. In this case, it will be where the posts are going to go. It doesn’t guarantee you’ll find where all the burials will be, anyway.”

And at any rate, Aiu said, “this is a federal project so we review it under 106,” a federal statute that allows a phased approach to archaeological surveys. Frankel maintains that it is also a city project and subject to state rules that forbid a phased AIS.

“The City has consulted with legal counsel throughout project planning,” Yoshioka wrote. “Pursuant to HRS Chapter 6E, the state or City permit granting authority will be required to notify SHPD when the project applies for permits (e.g., grading and grubbing) if the AIS shows that the project may impact a burial or other historic site. This would also include coordination with OIBC for pre-discovered burials.”

“We don’t have the fullest confidence of a good working relationship with the city to do the right thing with this,” said McKeague, noting the city has uncharacteristically excluded OIBC from consultations on the rail project. “It’s dampened our ability to be a positive contributor to workable solutions.”

Preservationists argue that it’s obvious the rail project will encounter iwi downtown, given the discoveries at Wal-mart, Ward Properties and Kawaihao Church, so great care should be taken in advance to avoid them. In their October 2009 letter, National Trust attorneys noted, “The City seems to assume that adverse effects to burials can be avoided because alterations — such as relocating guideway columns, using straddle-bent supports, or modifying span lengths — should allow most burials to be preserved in place. However, the OIBC rightly disagrees. The City cannot conclude with certainty that it will avoid burial sites.”

Aiu doesn’t dispute that burials likely lie along the rail’s route, although she downplays the prospect of a Honokahua replay. “I think the number of a thousand is a little high, but I think it’s reasonable to be concerned about the Kakaako area,” she said. “We have found a lot of burials in that area and I think we will find more. I’m not sure that moving the rail system anywhere in the downtown corridor will alleviate the Burial Council’s concerns because they have been found throughout the entire downtown area.”

McKeague said the purpose of the state burial law is to seek to identify iwi in advance, so as to avoid digging them up during construction. “That’s just not pono. By that time, it’s too late. That interaction, defilement and desecration has already occurred once the burial is disturbed.”

A phased approach undermines that objective, preservationists say, by committing the city to a route and technology before it knows what lies at the end of the line.

“It’s sort of an end run to force relocation, and that’s not what this [burial preservation] law was about,” Ayau said. “The law was designed to do a lot of the heavy work at the front end so you don’t have problems at the back end, and now they’re doing the opposite.”

Aiu disagrees. "I'm not entirely sure that was the legislative intent, because if you look at the way the law reads, it's [the survey] always triggered by a permit. When the laws were made there were compromises because you have to balance the various needs. Do you want it to be a policy of the state that when burials are found, they won't be moved? If so, the law needs to be changed."

McKeague, however, said the purpose of the law is stated in its introduction: "The Legislature found Native Hawaiian burials are especially vulnerable and often not afforded adequate dignity and freedom from unnecessary disturbance. That's why we're [the Burial Council] here. Early investigation, coupled with early consultation, can only afford the land developer or owner the best information to figure out a fair use of the land."

Ayau said that when the burial law was adopted in 1990, there was a great deal of discussion over whether the program should be housed within the Department of Land and Natural Resources (DLNR), or the Office of Hawaiian Affairs (OHA), an agency designed to serve Hawaiians, but lacking enforcement authority. It was ultimately placed under DLNR because of its enforcement powers.

"This perceived manipulation of the burials laws has raised that issue again," he said. "We have gotten into situations where the state refused to enforce the law and used its discretion not to enforce. Now we're looking at what would be necessary to give OHA the enforcement authority it needs to be effective."